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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

MEYER BILLER,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

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May , 1986

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QUESTIONS PRESENTED

1. Whether a prior conviction then on appeal may be used to impeach a defendant when the prior conviction is later determined to be constitutionally invalid (1) because it was based on compelled testimony in violation of New Jersey v. Portash (2) because it was based on conduct which on remand was held not to constitute a crime as a matter of law in violation of due process.

2. Whether a prior conviction then on appeal may be used wether a prior conviction then on appeal may be used to enhance a defendant's sentence when the prior conviction is later determined to be constitutionally invalid (1) because it was based on compelled testimony in violation of New Jersey v. Portash and (2) because it was basesd on conduct which on remand was

held not to constitute a crime as a matter of law, the use of which violated due process.

3. Whether the State of Connecticut by interpretation of state law, constitutionally can permit the police to arrest an individual without probable cause, conduct a search incident to that illegal arrest, and then use the fruits of the illegal search to convict the defendant of a distinct crime.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The petitioner, Meyer Biller, respectfully prays that a writ of certiorari issue to review the judgment and the decision of the Supreme Court of

the State of Connecticut which on March 6, 1986 denied certification to appeal from the judgment of the Appellate Court of the State of Connecticut rendered on December 7, 1985.

OPINION BELOW

On March 6, 1986, the Supreme Court of the State of Connecticut denied certification to appeal from the decision of the Appellate Court of Connecticut which was entered on December 17, 1985 as State of Connecticut v. Meyer Biller, 5 Conn. App. 616 A.2d (1985). The opinion and order appear in the Appendix to this petition.

JURISDICTION

By order dated March 6, 1986 the Supreme Court of the State of Connecticut denied the defendant's petition for

certification to appeal from the judgment of the Appellate Court of the State of Connecticut, that judgment was rendered on December 17, 1985. A motion to reargue before the Appellate Court was denied on January 29, 1986. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions: The Fourth Amendment to the United States Constitution which provides,

> "(Right of search and seizure regulated.) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution which provides,

> "(Criminal prosecutions, trials and punishments. Due process. Taking private property for public use.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the process of law, nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution which provides in relevant part,

> "(Citizenship defined. Privileges

> of citizens.) Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 38-69 of the Connecticut General Statutes provides in relevant part:

> "Public Adjuster" means any person, partnership, association or corporation who or which practices as a business the adjusting of loss or damage by fire or other hazard under any policies of insurance in behalf of the insured under such policies, or who advertises or solicits business as such adjuster, or holds himself out to the public as engaging in such adjusting as a business.

Section 38-71 of the Connecticut General Statutes provides:

> "Penalty for acting as agent, broker or public adjuster without license. Any person who acts within this state, either in his own behalf or as representative or agent of any other person or any partnership, association or corporation, as an insurance agent or as an insurance broker, or as a public adjuster, unless such person holds a license then in force from the commissioner authorizing him so to act, shall be fined not more than five hundred dollars or imprisoned not more than three months or both."

Section 53a-167a of the Connecticut General Statutes provides:

> "Interfering with an officer: Class A misdemeanor. (a) A person is guilty of interfering with an officer when he obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties. (b) Interfering with an officer is a class A misdemeanor."

STATEMENT OF CASE

The defendant was arrested for acting as a public adjuster without a license, General Statutes §38-71, and by substituted information was also charged with interference with a police officer, General Statutes §53a-167a. After the trial, the jury retired, announced a deadlock, received the so-called "Chip Smith" charge, deliberated some more, and returned deadlocked on the charge of acting as a public adjuster without a license, but convicted the defendant of interfering with a police officer. The trial court (Sullivan, J.) then sentenced the defendant to one year and imposed a $500.00 fine on the interfering charge, and declared a mistrial on the other. The defendant appealed to the Appellate Court which

affirmed the conviction, State v. Biller, 5 Conn. App. 616, --A.2d-- (1985) (App. 3) A motion to reargue was denied on January 29, 1986. (App. 13) The Connecticut Supreme Court on March 6, 1986 denied defendant's petition for certification to appeal to that Court (App. 2)

B. FACTS

On March 12, 1981, a fire took place at a house owned by Wilken Shaw at 79 Hallock Street in New Haven. At the scene of the fire, Joseph Toscano, an arson control assistant inspector assigned to the office of the New Haven State's Attorney, saw the defendant approach Shaw and his daughter-in-law, Willa Shaw. Toscano watched as the defendant spoke to the Shaws and as Wilken Shaw signed some documents. Toscano and another officer, Joseph Howard,

approached the trio and heard the defendant state to the Shaws that he would contact the insurance company. (Tr. 81-85, 316, 393-94.) The Shaws testified that they then asked the defendant to tear up the documents because Wilken Shaw had signed them without consulting his daughter-in-law and that the defendant complied. The police officers agreed that the documents were torn up after they approached the Shaws, but before the defendant's arrest. (Tr. 170, 175-76, 251, 256, 325-26, 395-96.)

Because he knew the defendant did not have a public adjuster's license, Toscano subsequently ordered the defendant's arrest. As Officer Howard handcuffed the defendant and tried to search him, the defendant bent over from the waist and kept

his hands over his pockets. The officers then led the defendant to a police car where he permitted the search. (Tr. 326-30, 342-47, 399-400.) The officers found the torn documents and blank originals in the defendant's pockets. (Tr. 400-08.)

The documents were a contract to to appraise and repair the fire damage with a clause authorizing the defendant as agent to select a licensed public adjuster for Wilken Shaw, the insured, and a form selecting Biller Associates as the public adjuster. (Exs. A, B, C, F-1, G-1.) Biller Associates was a separate corporate entity properly licensed with the Insurance Department whose licenced public adjuster was Larry Biller, the defendant's son. The defendant also presented evidence that

there were many other contractor-appraisers in the Greater New Haven area who specialized in fire damage repair and estimates, and who retained public adjusters on behalf of their clients, the insured property owners. (Tr. 128-30, 156-59, 162-65, 258-59, 273-90, 303-308, 462-66, 561-75, 582-95.)

During the trial the defendant filed a motion in limine to prevent the state from impeaching him with two felony convictions which were then on appeal. The trial court denied the motion and, as a consequence, the defendant was prevented from testifying on his own behalf. (App. 53-57) Tr.50, 604). The trial court also took the convictions on appeal into account in sentencing the defendant to the maximum of one year and imposing a $500.00 fine, (App.

11) noting, "two felony convictions in the past even though they are on appeal must be considered". (Tr. 733-34, 763) On appeal to the Appellate Court the defendant raised in his brief the federal issues set forth in this petition; they also were raised in the petition for certification to the Connecticut Supreme Court. (App. 61-65) It has now been determined that the prior convictions were invalid as a matter of constitutional law. The convictions were reversed because they were based on involuntary testimony, in violation of Fifth and Fourteenth Amendment privilege against self-incrimination. State v. Biller, 190 Conn. 594, 605, 462 A.2d 987, 993 (1983)(App. 15-41) On remand the trial court (Higgins, J.) found that the defendant could not have committed a crime

as a matter of law, even under the prosecution's theory of the disputed facts, and dismissed the action. (App. 42-52) The state did not appeal the dismissal. Therefore, it has now been conclusively determined that the trial court in this case acted on what turned out to be misinformation of constitutional magnitude. The prior invalid conviction, which did not even constitute a crime as a matter of law and which was based on coercion, both prevented the defendant from testifying and was used to enhance his punishment.

At trial the defendant filed a motion based on the Fourth and Fourteenth Amendments to suppress the documents seized as a fruit of his illegal arrest. (App. 58) The motion was denied by the trial court and the Fourth and Fourteenth

Amendment issue was raised before the Appellate Court (brief of defendant on appeal p. 12)(App. 66-72) The Appellate Court did not reach the issue because under its analysis of a state case, it was irrelevant. The defendant preserved the constitutional issue by raising it again in his petition for certification to appeal to the Connecticut Supreme Court. (App. 61-65)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A PRIOR CONVICTION THEN ON APPEAL MAY BE USED TO IMPEACH A DEFENDANT WHEN THE PRIOR CONVICTION IS LATER DETERMINED TO BE CONSTITUTIONALLY INVALID (1) BECAUSE IT WAS BASED ON COMPELLED TESTIMONY IN VIOLATION OF NEW JERSEY V PORTASH (2) BECAUSE IT WAS BASED ON CONDUCT WHICH ON REMAND WAS HELD NOT TO CONSTITUTE A CRIME AS A MATTER OF LAW IN VIOLATION OF DUE PROCESS.

As explained in the facts, the

defendant filed a motion in limine to restrict the use of the the prior conviction then on appeal. The trial judge recognized that the matter was on appeal, but denied the motion. As a result of that ruling, the defendant did not testify in his own defense. (App. 53-57; Tr. 50, 604.) The crux of the problem in allowing a conviction then on appeal to be used for impeachment is that if the judgment of conviction is later reversed, the defendant has suffered, injustly and irreparably, the prejudice caused by the disclosure of the former conviction.

The prior conviction used to impeach the defendant in this case was reversed because he was compelled to give testimony before an investigative grand jury, in violation of his privilege against self-

incrimination. State v. Biller, 190 Conn. 594, 605, 462 A.2d 987, 993 (1983)(Biller I). Unlike testimony obtained in violation of Miranda which may be used for impeachment, Harris v. New York, 401 U.S. 222 (1971), compelled or involuntary testimony may not be used, directly or indirectly, for any purpose. New Jersey v. Portash, 440 U.S. 450, 458-59 (1979); Biller I, supra, 190 Conn. at 605, 462 A.2d at 993. In Portash the defendant was compelled to testify before a state grand jury, much like the defendant in the Biller I. The trial court in Portash ruled that the compelled testimony could be used to impeach the defendant if he took the stand. The defendant did not testify and was convicted. This Court reversed the conviction, emphasizing that the

defendant's testimony before the grand jury was the "essence of coerced testimony" and could not be used for any purpose, impeachment or otherwise. Portash, supra, 440 U.S. at 459. In Mincey v. Arizona, 437 U.S. 385, 398 (1978), this Court declared that any use of an involuntary statement, even for impeachment purposes, is a denial of due process of law. It is therefore well established that within a single prosecution any use of compelled testimony for impeachment or otherwise violates both the privilege against self-incrimination and due process.

It is also clear that evidence derived from involuntary testimony, whether directly or indirectly, cannot be used in any other criminal case, nor can it lead to the infliction of criminal penalties in

other cases. Kastigar v. United States, 406 U.S. 441, 453 (1972)(the privilege prohibits any use of compelled testimony "as well as evidence derived directly and indirectly therefrom"); Lefkowitz v. Turley, 414 U.S. 70, 78 (1973)(a witness protected by the privilege is "protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case") (emphasis added); New Jersey v. Portash, 440 U.S. 450, 457-8 (1979). As this Court said in Kastigar, the privilege against self-incrimination:

> prohibits the prosecutorial authorities from using the compelled testimony in any respect, and therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. 406 U.S. at 453 (emphasis in original).

In Counselman v. Hitchcock, 142 U.S. 547

(1892), the first case in which this Court considered a challenge to an immunity statute, it held that the statute was deficient because it did not prohibit the use of evidence derived from the compelled testimony of the witness.

In this case the state made derivative use of the defendant's compelled testimony by using the Biller I conviction, itself based on involuntary testimony, to obtain the present conviction. Therefore, the present conviction was derived from the earlier coerced testimony.

A prior conviction used for impeachment, which is later invalidated on constitutional grounds, will impermissibly taint a conviction. Loper v. Beto, 405 U.S. 473 (1972). In Loper, the defendant was tried in 1947 and impeached with four

felony convictions dating from 1931 to 1940. Sixteen years later Gideon v. Wainwright, 372 U.S. 335 (1963), was decided and made wholly retroactive, Pickelsimer v. Wainwright, 375 U.S. 2 (1963)(per curiam)(mem.), thereby voiding the impeachment convictions. In 1969, some 22 years after his conviction, the defendant in Loper sought habeas corpus, claiming that the use of the prior uncounseled convictions for impeachment, later determined to be void, violated due process. The Court agreed, holding that the use for impeachment purposes of convictions later found to be invalid under Gideon deprives a defendant of due process of law, and granted the writ. Loper, supra, 405 U.S. at 483.

This is a much easier case than Loper.

First, the prior conviction was on direct appeal at the time it was offered, minimizing retroactivity issues. Second, the compelled testimony issue was known to the state when it offered the prior conviction for impeachment since the prosecutor was from the same state's attorney's office which compelled the defendant's testimony over his assertion of the privilege before an investigative grand jury, limiting any claim that the prosecutor who offered the evidence could not have anticipated that it was tainted. Third, the defendant informed the trial judge that the prior conviction was on appeal, the preliminary statement of issues had been filed identifying a self-incrimination claim and the case was reversed for well-established Fifth

Amendment principles, limiting any argument that the trial judge could not have anticipated the outcome because of a sudden change in the law. (App. 14-41) Fourth, this case is on direct appeal, minimizing any concerns about the finality of criminal judgments.

The state has used the Biller I conviction, which itself was based on involuntary testimony, to obtain this conviction. Thus, the present conviction is derived from involuntary testimony, in violation of the privilege against self-incrimination and due process of law under the Fifth and Fourteenth Amendments of the United States Constitution.

There is a second reason why the prior conviction is constitutionally invalid. The defendant in Biller I argued that his

actions, even under the prosecution's version of the disputed facts, did not constitute a crime as a matter of law, Biller I, 190 Conn. at 610, 620-21, 562 A.2d 1001, an argument which ultimately prevailed. On remand of Biller I the trial court (Higgins, J.) found that the defendant could not, as a matter of law, have committed the crime with which he was charged and granted the defendant's motion to dismiss. (App. 42-52) The state did not appeal that dismissal. Therefore, it has now been conclusively determined that the defendant in Biller I did not commit a crime.

Since the state, in order to obtain a conviction consistent with due process, is required to prove beyond a reasonable doubt every essential fact necessary to establish

the crime charged, In re Winship, 397 U.S. 358, 364 (1970), the prior conviction, based as it was on innocent activity, necessarily was obtained in violation of specific federal due process of law protection, Thompson v. Louisville, 362 U.S. 199, 206 (1960)(to convict and punish without evidence of guilt violates due process). Therefore, the use of that unconstitutional evidence to obtain this conviction also violates due process. Loper v. Beto, 405 U.S. 473 (1972)(impeachment use of a prior conviction later determined to be constitutionally invalid deprives defendant of due process). In addition to Loper, other significant United States Supreme Court decisions support the defendant's position. In Spencer v. Texas, 385 U.S.

554 (1967), the Court allowed a valid prior conviction to be introduced against the defendant under the Texas recidivist statute even though Texas did not provide a two-stage jury trial, one for the underlying offense and one for the recidivist charge. In upholding that procedure against a general fairness due process argument, the Court noted that the use of the prior conviction involved "no specific federal right--such as that dealing with confessions. . . ." Spencer, supra, 385 U.S. at 565. Here, by contrast, the use of the prior conviction involves coerced testimony, a specific federal right that does deal with confessions and the due process right requiring the state to prove the essential elements of a crime before it can obtain a conviction. Therefore, the

later use of that invalid conviction violates due process. See also, Burgett v. Texas, 389 U.S. 109, 115 (1967)(use of conviction obtained in violation of Gideon v. Wainwright to support guilt or enhance punishment violated a federal constitutional right, was inherently prejudicial, and instructions to disregard the prior convictions did not make the error harmless beyond reasonable doubt).

Both the due process and self-incrimination issues surrounding the use of the Biller I conviction then on appeal for impeachment in this case were briefed and argued before the Appellate Court and also briefed in the petition for certification, whose its opinion ignores them. (App. 3-12) The state claimed that the constitutional issues were not raised

when the use of the prior conviction was discussed at trial. There are, however, several answers to that argument. First, as a matter of state law in Connecticut, a criminal defendant is entitled to raise fundamental constitutional issues for the first time on appeal under the Evans doctrine. State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973). Second, the use for impeachment purposes of a conviction later declared to be constitutionally invalid is itself an issue of constitutional dimension permitting review under Soper v. Beto. Third, the trial judge was informed of the appeal and the record in this case reflects that there was a general discussion of the matter in chambers. (Tr. 604.) Fourth, the preliminary statement of issues was filed in Biller I raising the compelled

self-incrimination issue, a readily available appeal paper which the trial court did not examine, (Tr. 604; Finally, since the Biller I reversal and later dismissal all came about after the trial in this case, this Court can judicially notice those results and, in the interests of justice, reverse the present conviction as it reversed the conviction in Soper v. Beto.

The state may also argue that the issue should not be considered because the defendant did not testify and therefore the prejudice remains speculative, citing Luce v. United States, ____U.S.____, 105 S.Ct. 460 (1984). The short answer is that at the time this case was tried, November, 1982, both the Connecticut Supreme Court and the United States Supreme Court

recognized the prejudice inherent in a defendant's failure to testify and decided appeals based on motions in limine. State v. Iasevoli, 188 Conn. 325, 326-29, 449 A.2d 996, 997 (1982); New Jersey v. Portash, 440 U.S. 450, 453-56 (1979). Furthermore, unlike Luce there is no probative verses prejudice analysis needed to determine admissability. Since Biller I was based on compelled testimony, it should not having been admitted at all.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A PRIOR CONVICTION THEN ON APPEAL MAY BE USED TO ENHANCE A DEFENDANT'S SENTENCE WHEN THE PRIOR CONVICTION IS LATER DETERMINED TO BE CONSTITUTIONALLY INVALID (1) BECAUSE IT WAS BASED ON COMPELLED TESTIMONY IN VIOLATION OF NEW JERSEY V. PORTASH AND (2) BECAUSE IT WAS BASED ON CONDUCT WHICH ON REMAND WAS HELD NOT TO CONSTITUTE A CRIME AS A MATTER OF LAW, THE USE OF WHICH VIOLATED DUE PROCESS.

In sentencing the defendant the trial

court said that the "[t]wo felony convictions [meaning the two counts of Biller I] in the past even though they are on appeal must be considered." (Tr. 763.) The court then sentenced the defendant to the maximum of one year in jail and imposed a $500.00 fine. (Tr. 763-64.)

From the arguments and authorities cited in the previous section of this Petition, it should be clear that the use of a constitutionally defective conviction to enhance a defendant's punishment is itself a due process violation, particularly when the prior conviction has been voided because, as a matter of law, no crime has been committed. In United States v. Tucker, 404 U.S. 443 (1972), the trial judge took into account three previous felonies when sentencing the

defendant. Several years later it was determined that two of the prior convictions were invalid because they were obtained without counsel. In a subsequent collateral proceeding this Court vacated the sentence and remanded for re-sentencing:

> [W]e deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. 404 U.S. at 447.

The fact that a person has not committed a crime is surely misinformation of constitutional magnitude. If a person has not committed a crime, then the state has not proven beyond a reasonable doubt the essential facts necessary to constitute that crime, in violation of Fourteenth Amendment Due Process. In re Winship, 397

U.S. 358, 364 (1970); Thompson v. Louisville, 362 U.S. 199, 206 (1960). Therefore, to use that constitutional misinformation to enhance his punishment is to punish the defendant for a crime he did not commit, a violation of a specific federal constitutional due process right. The fact that the prior conviction which enhanced the defendant's sentence was also based on compelled testimony is also misinformation of constitutional magnitude. Under either approach, the defendant is being "denied anew" a "specific federal right", Burgett v. Texas, 389 U.S. 109, 116 (1967). See also, Baldasar v. Illinois, 446 U.S. 222, 224 (1980)(concurring opinion).

The defendant's sentence in this case was enhanced because the trial court took

into consideration the Biller I conviction then on appeal, constitutional misinformation which was as unreliable as anything produced by a judicial system since it did not, in fact, even constitute a crime as a matter of law. Furthermore, the use of that misinformation violated fundamental values central to our judicial systems since it was also based on compelled testimony. Therefore, the sentence below should be vacated and the case remanded for re-sentencing. Since the court below decided otherwise, certiorari should be granted.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW ALLOWS THE POLICE TO ARREST AN INDIVIDUAL WITHOUT PROBABLE CAUSE, CONDUCT A SEARCH INCIDENT TO THAT ILLEGAL ARREST, AND THEN USE THE FRUITS OF THE ILLEGAL SEARCH TO CONVICT THE DEFENDANT OF A DISTINCT CRIME.

As explained in the facts, the police searched the defendant at the police car incident to his arrest and seized the documents from his pockets. These documents were then introduced against the defendant. (Exs. A, B, C, F-1 through F-4, G-1 through G-5). No limitation was made as to their use and, quite obviously, they were applicable to both counts. If the defendant had nothing in his pockets, and did not interfere with police activity in any meaningful way, it is unlikely the jury would have convicted him. Therefore, the documents were central to the state's interfering charge, if only to prove intent.

The defendant filed a motion to suppress the documents, inter alia, based on the Fourth and Fourteenth Amendments

which was heard at the same time as the motion to dismiss. (App. 58-60; Tr. Nov. 9, 25.) Although defendant's brief before the court below emphasized the motion to dismiss (because State v. Licari, 153 Conn. 127, 214 A.2d 900 (1965) had not yet been overruled) it pointed out the motion to suppress and expressly concluded the illegal arrest section by stating "[t]he evidence seized from the defendant's person during this illegal arrest must also be suppressed." Brief of Defendant at 12. (App. 72) See also Reply Brief of Defendant.

The court below did not reach the question of probable cause because, under its analysis of State v. Privitera, 1 Conn. App. 709, 476 A.2d 605 (1984), it was irrelevant. State v. Biller, 5 Conn. App.

at 620, 501 A.2d 392 (1985)(App. 3) Therefore, the opinion below would allow, in effect, evidence seized during an illegal arrest to be used to support an interfering charge, which is what happened here. As such, the court below is wrong. The fruits of a search incident to an illegal arrest must be suppressed under the Fourth and Fourteenth Amendments Wong Sun v. United States, 371 U.S. 471, 484-87 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

The defendant's arrest on the charge of acting as a public adjuster was under the totality of the circumstances clearly without probable cause. Gates v. Illinois, 462 U.S. 213 (1983)

At the hearing on the defendant's motions to dismiss and suppress, Toscano, the Arson Control Assistant Inspector,

testified that when he saw Biller approach the scene of the fire, his "investigative instinct was aroused" because he knew Biller did not then have a public adjustor's license. (Tr. Nov. 9, 31, 30-2.) Although Toscano acknowledged that a contractor and an appraiser could each solicit business from an owner at the scene of a fire, he was of the opinion that "anyone, whether he be a building contractor or a private citizen who ·· contracted for a public adjustor would be in violation of the rules...." (Tr. Nov. 9, 56.) He also thought the defendant was acting as a public adjustor because he heard him say to the Shaws that "when the fire department finished what they were doing he would come back and appraise the loss for the insurance company." (Tr. Nov.

9, 34.)

Inspector Toscano's interpretation of the law was wrong. Nothing prohibits a contractor from retaining the services of a public adjustor on behalf of an owner. As Jean Shea, Assistant Division Chief, Licenses and Claims Division, Department of Insurance, explained when cross-examined at trial by the defense:

> Q An insured can authorize a contractor to hire a public adjustor for them?
>
> A That would really be addressed under law of agency. I would presume so. (Tr. 462.)

Allan Sabel, a public adjustor at the scene of the fire, was called at trial by the State. On cross-examination, he confirmed Ms. Shea's understanding of the law. He testified that contractors routinely solicit business at the scene of a fire;

that contractors may hire public adjustors on behalf of owners; and that contracting is not public adjusting. (Tr. 276-77.)

In addition to seeing a transaction taking place at the scene of a fire and hearing the defendant say he would appraise the loss for the insurance company, matters which were legal, the officers testified that Wilken Shaw said to them that the defendant used the words "public adjustor," a factor the officers thought critical in their assessment of probable cause. According to the officers, Shaw told Officer Howard, in a conversation which Toscano claimed he overheard, that the defendant had represented himself to Shaw as a public adjustor. (Tr. Nov. 6, 62-4, 73, 77; Tr. 28, 31, 45.) During the evidentiary hearing Toscano was never asked

by the State to quote the exact words he heard Shaw say. Everything Toscano testified to is consistent with the defendant telling Shaw that he had been a public adjustor in the past, mentioning that fact to Shaw as a credential in his quest for his current construction-appraisal business. For example, Toscano used the following past tense verbs at the hearing: "had represented," "had approached them and represented," "[t]hat he had represented himself as a public adjustor" and "they [the Shaws] stated he had represented himself as a public adjustor." (Tr. Nov. 6, 63-4; 73; 77.) Inspector Toscano was not sure whether Wilken or Willa Shaw used the words "public adjustor" prior to Biller's arrest, but he was certain one of them did. (Tr. Nov. 6,

78-79.)

Officer Howard's testimony at the hearing does not change matters. Howard said Biller was arrested because he "had represented himself to Mr. Shaw and the woman as a public adjustor." (Tr. 28.) That conclusion was based on what "we had seen and with the conversation I had with Mr. Shaw prior to, prior to Biller's arrest." (Tr. 28.) He said that he was at the fire scene when Inspector Toscano called his attention to the defendant. (Tr. 10-11.) He had been on the arson squad only four months and was not sure whether it was legal for a builder to solicit business at the scene of a fire. (Tr. 21.) Prior to the arrest, he heard the defendant say to Shaw words "to the effect that he [Biller] would get back in

touch with them [the Shaws] and that he would take care of things with the insurance company, not the exact quote, but that was the content of the remarks." (Tr. 24-25.) After Inspector Toscano informed the Shaws that Biller did not have a license, Willa Shaw, according to Howard, asked the defendant to tear up the documents. (Tr. 29-31; 33-5.) While the defendant was tearing up the documents, Howard said he talked with Shaw:

> A [BY OFFICER HOWARD] I asked Mr. Shaw what had transpired between him and Mr. Biller? [sic]
>
> Q [BY MR. DOW] Un huh.
>
> A And Mr. Shaw represented to me that Mr. Biller had approached him and had purported himself to be a public adjustor and that Mr. Biller would take care of all the dealings between Mr. Shaw and the, and whatever insurance company was involved.
>
> Q Are you sure that Mr. Shaw did not

say that Mr. Biller would contract with a public adjustor?

A Mr. Shaw, without my having said beforehand, used the word quote unquote public adjustor.

Q You are certain of that?

A Yes, sir.

Q Now, can you tell us where Willa Shaw was when that statement was uttered?

A Willa was engaged at that time in her request to have Mr. Biller rip up the form. (Tr. 31.)

That Shaw said the words "public adjustor" and little else is made clear by defense counsel's effort in the following exchange:

Q Let me ask it this way. At any time did Mr. Shaw indicate to you with any degree of certainty whatsoever, whether or not Mr. Biller represented himself to be a public adjustor?

A Mr. Shaw said the words "public adjustor." (Tr. 45.)

To summarize, the evidence at the hearing on the motions to dismiss and

suppress established that (1) Inspector Toscano, the ranking officer who ordered the arrest, did not understand the law; (2) the police saw a transaction at the scene of a fire which, by the very documents themselves, was legal; (3) the defendant tore up the documents at the request of Willa Shaw; (4) the defendant said to the officers when they approached "I know who you are;" (5) Shaw said the defendant used the words "public adjustor;" (6) Shaw said words to the effect that the defendant represented himself as a public adjustor, all verbs in the past tense; (7) the defendant had been a public adjustor, past experience which may have added to the credentials of a contractor-appraiser specializing in fire damage; (8) Inspector Toscano knew the defendant had been a

public adjustor; and (9) the defendant was not, at the time of the Shaw transaction, a licensed public adjustor.*

The fact that the police chose to proceed without a warrant must be emphasized. This Court has expressed its strong preference that law enforcement officers obtain a warrant, if possible, before detaining a person suspected of a crime. E.g., Wong Sun v. United States, 371 U.S. 471, 479 (1963); Beck v. Ohio, 379 U.S. 89, 96 (1964). The warrant process interposes an orderly procedure between the desires of the police to make arrests and the privacy and liberty of citizens.

The warrant process avoids the

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* The defense attempted to call Wilken Shaw at the hearing, but the trial court sustained the State's objection.

difficult problem of litigating after-the-fact whether a violation occurred. It prevents officers and magistrates alike from being "subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964). Although the Fourth Amendment permits warrantless arrests in public places, United States v. Watson, 423 U.S. 411 (1976) that warrantless action must be supported by probable cause. The preference for warrants means that, in a close case, the fact that the officers proceeded without a warrant may result in a finding of illegality. United States v. Ventresca, 380 U.S. 102, 106 (1965)(in a "doubtful or marginal" case a warrant may be sustained where without one it would fail).

To have arrested the defendant for public adjusting without a license, an unclassified misdemeanor, Inspector Toscano and Officer Howard were required to have probable cause for believing under the totality of the circumstances that Biller was violating §38-71 at the time they arrested him. Reasonable suspicion that a crime has occurred, no matter how well justified, is not sufficient to support an arrest.

Probable cause exists when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed. E.g., Carroll v. United States, 267 U.S. 132, 161-62 (1925); Wong Sun v. United States, 371 U.S. 471, 479 (1963). As this Court in Wong Sun said,

"suspicion...[cannot] be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked." 371 U.S. at 484. Furthermore, the probable cause test is an objective one. This Court has said repeatedly that the facts must be such as to warrant belief by a "prudent man," Henry v. United States, 361 U.S. 98, 102 (1959).

Applying these standards to the evidence offered at the hearing on the motions to dismiss and suppress, it is clear that reasonable, prudent, cautious police officers would not have probable cause to arrest Biller for violating §38-71. Shaw would, in all likelihood, never have mentioned the words "public adjustor" had the police officers not put

those words into his mind by asking Biller for his license in the first place. That aside, this record does not establish Biller was acting as a public adjustor or representing himself to be one on March 12, 1981. Whenever Toscano or Howard was asked to repeat what Shaw said, in Shaw's own words, the only answer given was "public adjustor." Biller was at the scene of the fire soliciting business as a contractor-appraiser. As such, he was legally entitled to contact the insurance company to take care of that business and was legally entitled to act as an agent for the owner to retain a licensed public adjustor, which Biller Associates was. As explained earlier, Inspector Tuscano did not understand the law and thought those actions illegal. The officers'

after-the-fact attempted justification on the grounds that Shaw said that Biller represented (past tense) himself as a public adjustor is consistent with Biller having been a public adjustor, which Toscano knew. The documents admitted at the hearing all support these facts. (Hearing Exhibits A, B, C and D made Trial Exhibits A, B, 3 and C respectively.)

Even if Biller did say to Shaw "I am a public adjustor," or words to that effect, that "misrepresentation" itself would not create probable cause to believe §38-71 was being violated. The term public adjustor is defined in §38-69 as one who either (1) practices as a business the adjusting of fire damage under an insurance policy on behalf of the insured; or (2) advertises or solicits business as such

adjustor; or (3) holds himself out to the public as engaging in such adjusting as a business. Thus, to be a public adjustor, a person must either be representing an insured before an insurance company, soliciting public adjusting business as an adjustor or making representations as an adjustor to the public at large. There is no suggestion the defendant did anything remotely related to representing an insured before an insurance company, nor is there any evidence that the defendant held himself out to the general public as an adjustor. The only argument the State can make is that the defendant was soliciting business as an adjustor. But like the other two definitions, there is no evidence from which the police could conclude the defendant was soliciting public adjusting

business for himself either. All the evidence points squarely to the fact that the defendant was soliciting contracting-appraising business only, the adjusting business expressly to be done by others. A contractor who says "I am a public adjustor" while soliciting contracting business is not soliciting public adjusting business for himself, and therefore is not violating §38-71 or §38-69.

An example may help to clarify the argument. Assume I have gone into the contracting business and no longer have my license to practice law. Assume further that I solicit contracting business and in the process tell the prospective customer that I am a lawyer. The question would be not whether I solicited contracting business, nor whether I misrepresented

myself as a lawyer, but whether I solicited legal business by saying I was licensed to practice law. There is nothing in this record from which a reasonable prudent police officer could have concluded the defendant was soliciting public adjusting business for himself. The defendant was soliciting contracting business only, and would, as agent, hire others to do the adjusting.

Until such time as the Connecticut legislature makes it illegal for an owner to delegate to another the right to hire a public adjustor, any person may solicit the business the defendant sought in this case, just as a property management firm solicits the management business, and agrees as agent for the owner to place the insurance. The defendant's use of the words "I am a

public adjustor," therefore, could have been, at most, misrepresentation. No one in this case, however, claims Inspector Toscano or Officer Howard had grounds for that type of an arrest, and the documents themselves belie any such argument.

This arrest was surrounded with problems. The defendant's conduct was more consistent with legal behavior than illegal. Sections 38-71 and 38-69 had not been interpreted in reported decisions. Thus, the situation cried out for a pre-arrest judicial interpretation through the warrant process, rather than the post-arrest after-the-fact justification made inevitable by the warrantless arrest. Under all the circumstances, a reasonable prudent police officer would not have concluded that the defendant committed the

crime of adjusting without a license on March 12, 1982. Because if was a fruit of an unlawful arrest, the evidence seized from the defendant's person during this illegal arrest should have been suppressedas a matter of federal constitutional law.

CONCLUSION

For the foregoing reasons this Court should grant the petition for writ of certiorari.

Respectfully submitted,

By_____

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